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POINT

Employees sue T-Mobile for work done remotely using a company-issued Blackberry or other smart device when “off-the-clock,” such as during their lunch breaks, weekends and evenings.

In *Agui v. T-Mobile*, No. 1:2009cv02955 (E.D.N.Y., July 10, 2009), the plaintiffs seek to recover wages on behalf of themselves and other retail sales associates and supervisors for time worked “for which they received no compensation at all.” Specifically, they allege that they “were required to review and respond to T-Mobile e-mails and text messages at all hours of the day, whether or not they were punched in to T-Mobile’s computer-based timecard system.” Interestingly, the case is brought as a putative *collective action* against T-Mobile and its management, identified as “John Does #1-10,” pursuant to the provision of the Fair Labor Standards Act (“FLSA”) that permits liability against individuals, and is also being brought against T-Mobile as a putative *class action* pursuant to the California Wage Law. If a class is certified by the court, putative plaintiffs won’t have to affirmatively opt-in to the lawsuit under the California Wage Law. Those putative plaintiffs who do opt-in, pursuant to the procedure under the FLSA, can hold the individual managers jointly and severally liable for damages.

IMPACT

*The T-Mobile lawsuit is just one more example of how the FLSA is currently a hot-bed of employment-related litigation: in 2008, 1,304 FLSA cases were filed against employers in the Southern District of Florida, the federal court which covers Palm Beach, Broward and Dade counties. As of June 22, 2009, 581 FLSA cases have been filed in the Southern District. (These figures do not include the number of FLSA cases filed in state courts.) Further, the Federal Judicial Center reported that labor class actions, mostly consisting of FLSA opt-in collective actions, have increased 228 percent from the first six months of 2001 to the first six months of 2007. Emery G. Lee, III, et al., *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report 3* (Federal Judicial Center 2008), [http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/\\$file/cafa0408.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf).*

The FLSA requires that employers pay non-exempt employees for all time suffered or permitted to work. See 29 C.F.R. § 785.11. Employers have the burden of maintaining accurate time records of all hours worked by non-exempt employees. Employers must have clear policies that outline how and when non-exempt employees may perform work, such as checking e-mail and voice mail, outside of regular business hours, as well as procedures for reporting any such time. Employers should consider the following:

- *Determine whether it is necessary that non-exempt employees are given remote access through mobile technology.*

- *Have clear policies requiring non-exempt employees to record and report all time worked, and ensure that all employees are familiar with those policies and related procedures.*
- *Ensure policies and procedures make it clear to non-exempt employees that even very short periods of time worked must be documented and reported. Recognize that employees may be disinclined to record short periods of time worked returning a phone call or responding to an e-mail.*
- *Be mindful of policies and practices, whether written or unwritten, which encourage employees to check-in while at home or on vacation.*
- *Perform regular checks of non-exempt employees' use of employer-owned technology through log-in and use records to ensure those employees are reporting all time worked.*

As more employers provide employees with remote access to the workplace through mobile technology, such as BlackBerry devices, cellular phones, personal digital assistants (or "PDAs"), and laptops, the potential for lawsuits to recoup unpaid wages increases. If you have non-exempt employees who access their work e-mail and/or voice mail during non-business hours or while out of the office (at lunch, out sick or on vacation), you must ensure they are compensated for that time worked. With wage and hour litigation on the rise, it is crucial to have and enforce clear policies and procedures which address documenting and reporting time worked by non-exempt employees.

If you have questions or concerns about your policies or procedures, or the proper classification of non-exempt employees, please feel free to contact us.

POINT & IMPACT is a publication of Christine D. Hanley & Associates, P.A., featuring points of interest in the developing employment and labor law. **POINT & IMPACT** is provided for general information purposes only and is not intended as legal advice. If you need guidance with respect to specific circumstances or issues, please seek the advice of counsel. You may contact the attorneys at Christine D. Hanley & Associates, P.A. at (561) 659-5646 or access our website at www.cdhanley.com for additional information.

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